IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.364 OF 2006

Kacharu Nana Phad & Ors. ...Appellants

Vs.

Chindu Namdeo Phad & ors. ...Respondents

Mr.P.N.Joshi for the Appellants
Mr.S.M.Sabrad for the Respondents.

CORAM: A.S.OKA, J.
DATED: APRIL 7,2006.

P.C.:

1. Heard Shri Joshi for the Appellants and Shri Sabrad for the Respondent Nos.1 and 2. The Appellants are the original Defendants and the Respondent Nos.1 and 2 are original Plaintiffs. In a suit filed by the Respondent Nos.1 and 2 decree for partition has been passed. The decree has been confirmed in an Appeal by the District Court.

2. The respondent Nos.1 and 2 who are the original Plaintiffs are claiming through one Namdeo who died in the year 1970. Respondent No.1 is the widow of the deceased Namdeo and the respondent No.2 is the son of deceased Namdeo. Deceased Namdeo had one brother by name Nana who died in the year 1972. Namdeo and Nana are the sons of deceased Deoram. The present Appellants are claiming through the deceased Nana.

3. Shri Joshi for the Appellants submitted that an application was made by the Appellants in the Trial court at exh.133 seeking amendment to the written statement. He pointed out that the defence originally taken by the Appellants was that there was a prior partition between Namdeo and Nana. He pointed out that by the amendment the Appellants desired to bring on record the fact that the deceased Namdeo sold the property allotted to his share in the partition and the said property was purchased by the deceased Nana by a registered sale deed. He pointed out that by amendment this crucial fact was sought to be brought to the notice of the Trial Court. He pointed out that an order dated 13th September 1986 was passed by the Trial court by which the said application was rejected. He submitted that the application for amendment ought to have been allowed and the grievance to that effect has been made before the Appellate Court. He submitted that necessary documents were produced in the trial court in support of the amendment which was sought to be incorporated and if the said documents are considered, plea of prior partition is squarely established. He, therefore, submitted that the amendment ought to have been allowed and the matter deserves to be remanded to the trial court.

4. I have considered the submissions. The Trial Court while

rejecting the application for amendment recorded that the application for amendment was moved after the original Plaintiffs had led their evidence. The learned trial Judge observed that in the original written statement filed by the Appellants they have merely contended that the suit property was their separate property as the partition was already effected. The learned Judge held that the Appellants cannot be allowed to take out application for amendment after recording of all evidence on the side of the Plaintiffs was completed.

5. It must be noted here that the in evidence the Appellants did produce the documents in support of the contentions which were raised in the proposed amendment. However, the said documents were not proved in accordance with law by the Appellants. It appears that Appellants were permitted to produce the said documents by the trial court.

6. The Appellate Court has also considered the grievance of the Appellants regarding rejection of the application for amendment by the trial court. The Appellate court noted that as the side of the original Plaintiffs was closed when the application for amendment was made, prejudice would have been caused to the original Plaintiffs if the said application for amendment was allowed at such belated stage.

7. The Courts below considered the evidence on record and found that the Respondent Nos.1 and 2 had established that the suit properties were joint family properties. Both the courts below have found that the Appellants failed to establish that there was earlier partition effected between the brothers.

8. There is no error in the view taken by the Appellate Court in so far as the rejection of the Application for amendment is concerned. The courts below recorded the findings of fact which were borne out by the evidence on record. No substantial question of law arises. Second Appeal is dismissed with no order as to costs.

Judge.